87 - 1366

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

ANDREW T. DUBISH,
Appellant,

vs.

STATE OF KANSAS,
Respondent.

ON APPEAL FROM THE SUPREME COURT OF KANSAS

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Does appellant's sentence to life imprisonment for aggravated kidnapping constitute cruel and unusual punishment as proscribed by the Eighth Amendment to the United States Constitution.

2. Was appellant denied due process in violation of the United States Constitution by the Court turning down his K.S.A. 60-1507 Motion attacking sentencing on the grounds the appellant's claim as to the unconstitutionality of the aggravated kidnapping statute and its attendant punishment were mere trial errors and should have been raised on direct appeal.

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No.

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ON APPEAL FROM THE SUPREME COURT OF KANSAS

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The District Court of Lyon County, in hearing the K.S.A. 60-1507 Motion attacking sentencing, found the aggravated kidnapping statute, K.S.A. 21-3421, and attendant punishment statute, K.S.A. 21-4501, were not in violation of the Eighth Amendment to the United States Constitution on the basis of proportionality. Appendix, p. A10.

The Kansas Court of Appeals, in an unpublished memorandum opinion, upheld the constitutionality of the Kansas aggravated kidnapping statute, K.S.A. 21-3421 and the

attendant punishment statute for aggravated kidnapping, K.S.A. 21-4501, and refused to consider the constitutionality of these statutes on appeal. The Kansas Court of Appeals ruled that the K.S.A. 60-1507 Motion attacking sentencing did not allow for consideration of whether K.S.A. 21-3420 and 21-4501 were constitutional since the appellant had previously appealed from his conviction in the District Court of Lyon County, Kansas to the Appellate Court on other grounds and a later K.S.A. 60-1507 Motion attacking sentencing was not proper under Kansas law. Appendix, p. A5.

This appeal is from a final judgment of the Supreme Court of the State of Kansas after consideration of the appellant's petition for review of the decision of the Kansas Court of Appeals denying review. Appendix, p. A4.

JURISDICTION

This appeal is from the final judgment of the Supreme Court of the State of Kansas denying the appellant's petition for review of the decisions of the Kansas Court of Appeals and the District Court of Lyon County upholding the constitutionality of the Kansas aggravated kidnapping statute and attendant punishment of life imprisonment for such a crime. The Supreme Court of the United States has jurisdiction on appeal pursuant to 28 U.S.C. §1257(2).

The petition for review was denied by the Kansas Supreme Court on November 16, 1987, and the decision of the Court of Appeals became final on this date. Notice of Appeal was mailed to the Clerk of the Supreme Court of the State of Kansas on December 15, 1987, and subsequently filed on December 17, 1987. Notice of Appeal was mailed to the Clerk of the Court of Appeals of the State of Kansas where the record was located on December 15, 1987, and subsequently filed on December 17, 1987. Notice of Appeal was also mailed to the District Court of Lyon County on December 15, 1987, and subsequently filed.

While the Kansas Court of Appeals and the Kansas Supreme Court did not reach the merits of whether or not the aggravated kidnapping statute and its attendant punishment of life imprisonment are unconstitutional, the United States Supreme Court does have jurisdiction to hear the matter based upon 28 U.S.C. §1257(2) and relevant case law. The State of Kansas is allowed to choose the appropriate procedure to allow an appellant to vindicate his federal rights in state courts, but by the state courts using such procedure to close the door to any consideration of the appellant's claim of denial of his federal rights, the question is not simply one of state procedure,

and the United States Supreme Court has jurisdiction to hear the appellant's claim. *Young v. Regan*, (Ill. 1949) 337 U.S. 235, 93 L. Ed. 1333, 69 S. Ct. 1073.

The denial, by the Kansas Court of Appeals and the Kansas Supreme Court, of hearing the merits of appellant's claim based upon procedural results denies the appellant his rights guaranteed under the Eighth Amendment of the United States Constitution to be free from statutes with punishment that is cruel and unusual.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

Article 21, Section 3420 of the Kansas Statutes Annotated, K.S.A. 21-3420 (1981), pertaining to kidnapping, provides:

> "Kidnapping is the taking or confining of any person, accomplished by force, threat or deception, with the

intent to hold such person: (a) For ransom, or as a shield or hostage; or (b) To facilitate flight or the commission of any crime; or (c) To inflict bodily injury or to terrorize the victim or another; or (d) To interfere with the performance of any governmental or political function. Kidnapping is a Class B felony."

Article 21, Section 3421 of the Kansas Statutes Annotated, K.S.A. 21-3421 (1981), pertaining to aggravated kidnapping, provides:

"Aggravated kidnapping is kidnapping, as defined in section 21-3420, when bodily harm is inflicted upon the person kidnapped. Aggravated kidnapping is a Class A felony."

Article 21, Section 4501(a) of the Kansas Statutes Annotated, K.S.A. 21-4501(a) (1981), pertaining to sentencing on Class A felonies, provides:

"For the purpose of sentencing, the following classes of felonies and terms of imprisonment authorized for each class are established: (a) Class A, the sentence for which shall be imprisonment for life."

Article 60, Section 1507 of the Kansas Statutes Annotated, K.S.A. 60-1507 (1983), pertaining to prisoners in custody under sentence, provides:

"(a) Motion attacking sentence. A prisoner in custody under sentence of a court of general jurisdiction claiming the right to be released upon the ground that the sentence was imposed in violation of the constitution or laws of the United States, or the constitution or laws of the state of Kansas, or that the court was without jurisdiction to impose such sen-

tence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may at any time move the court which imposed the sentence to vacate, set aside or correct the sentence."

"(b) Hearing and Judgment. Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the county attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. The court may entertain and determine such motion without requiring the production of the prisoner at the hearing. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or is otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence said prisoner or grant a new trial or correct the sentence as may appear appropriate."

"(c) Successive motions. The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner."

"(d) Appeal. An appeal may be taken to the appellate court as provided by law from the order entered on the motion as from a final judgment on application for a writ of habeas corpus."

"(e) Exclusiveness of remedy. An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced said applicant, or that such court has denied said applicant relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of said applicant's detention."

Rules of the Kansas Supreme Court, 183(c)(3), pertaining to proceedings under K.S.A. 60-1507, provides:

"A proceeding under K.S.A. 60-1507 cannot ordinarily be used as a substitute for direct appeal involving mere trial errors or as a substitute for a second appeal. Mere trial errors are to be corrected by direct appeal, but trial errors affecting constitutional rights may be raised even though the error could have been raised on appeal, provided there were exceptional circumstances excusing the failure to appeal."

STATEMENT OF THE CASE

Appellant was convicted by jury of aggravated kidnapping and other offenses in the District Court of Lyon County, Kansas. *State v. Dubish,* 234 Kan. 708, 711, 675 P.2d 877 (1984) [hereinafter *State v. Dubish I*].

The evidence leading to Appellant's conviction was summarized in some detail by the Supreme Court in *State v. Dubish I, supra,* at 709-711.

Appellant and his wife had been married for twenty years and had two sons. They separated on July 30, 1982

and appellant's wife filed for divorce on August 2, 1982. A divorce hearing was held on September 17, 1982, but the Journal Entry granting Appellant's wife a divorce was not filed with the Clerk of the Court until October 15, 1982. *Id.* at 709.

On October 4, 1982, the younger son of Appellant was celebrating his seventh birthday. Appellant arranged with his wife to spend time with both of his sons to celebrate the younger boy's birthday. During the day, Appellant picked up the boys at his wife's residence in Emporia, Kansas. He agreed to return them at 10:00 o'clock P.M. *Id.* at 709.

When Appellant returned to the residence at 10:00 o'clock P.M., his wife was not there. The older son informed Appellant that she was in the process of moving. Appellant, with the two boys in his pickup truck, drove to the new residence. Finding no one there, he headed back toward the other residence. On the return trip, Appellant and his wife passed each other. She turned her car around and followed Appellant to the other residence. *Id.* at 709.

Appellant, upon arriving, parked in the driveway of the residence. His wife also pulled into the driveway. A male friend of Appellant's wife, who had been following her in a separate vehicle, parked across the street. Apparently, the presence of this individual was upsetting to Appellant, who walked across the street to remonstrate with him. After this discussion, the other man drove off. *Id.* at 709-710.

By this time, Appellant's wife had parked her car in front of the residence. Appellant walked to the car and said he wanted to talk with her. She said they could speak there. She attempted to back her car into

the driveway. He reached into the car and pulled the keys out of the ignition. The car engine continued to run. *Id.* at 710.

At this point, Appellant opened the car door and jerked his wife out of the car by her hair. He gave the car keys to the older son and told him to put it in the garage. The boy got into the car and drove off. Later he returned and telephoned the police. *Id.*

Appellant stated repeatedly that he wished to speak with his wife, but she did not wish to speak with him. He pulled her to his pickup truck and pushed her into the cab. He then ordered the younger son into the truck and drove off with both of them. *Id.*

Appellant drove north out of Emporia on Kansas Highway 99. In rural Lyon County he turned off Highway 99 onto a gravel road and stopped near a pond. Before alighting from the vehicle, Appellant threatened to throw his wife in the pond. Appellant told his son to lie down inside the cab of the pickup truck. Appellant got out of the vehicle and pulled his wife out with him. *Id.*

Appellant's wife testified at trial that he struck her and kicked her numerous times, and also that she performed oral sex on him. At the conclusion of this confrontation, Appellant drove off in his pickup truck, leaving his wife beside the road. He soon retured to the scene, but was unable to locate his wife, who was hiding. *Id.* at 710-711.

After Appellant drove off the second time, his wife got up and ran to a house about a mile away. The occupants of that home testified that her appearance was

quite disheveled, from the blows struck by Appellant and also from running barefoot through the countryside. *Id.* at 711.

Appellant's wife was taken by ambulance to an Emporia hospital. Examination by a physician revealed that she had numerous bruises to her face and body, highly visible to witnesses who saw her at the time, and to the eye of the camera. It does not appear, however, that any of her injuries were life-threatening, or that she sustained any fractures of bones, impairment of function, or any other permanent injury. *Id.*

On February 16, 1983, after a jury trial and finding of guilty, Appellant was sentenced to serve a life sentence for aggravated kidnapping, five to twenty years for aggravated sodomy, three to ten years for aggravated battery, and one to two years for making a terroristic threat, all to be served concurrently. *Id., State v. Dubish,* 236 Kan. 848, 696 P.2d 969 (1985) [hereinafter *State v. Dublish II*]. Appendix, p. A29.

Appellant filed a Notice of Appeal to the Supreme Court from these convictions on February 25, 1983. *Id.*

On April 5, 1983, Appellant filed a motion for modification of sentence and probation before the sentencing judge of the District Court of Lyon County, Kansas, where the trial was held. During the hearing on Appellant's motion for probation on May 3, 1983, the sentencing judge of the District Court of Lyon County, Kansas made the following statement in reference to Appellant's life sentence which had been imposed for aggravated kidnapping:

> "But I am also gravely concerned for taking 15 years, at least 15 years, out of the life of this man for this

occurrence. I feel that Mr. Dubish should serve some time. He's served seven months to this time. I feel that he should serve some more time because of the seriousness of this offense, but I cannot in good conscience state that he should serve at least 15 years out of his life."

"So on this motion we have four felonies for which sentences have been imposed, and what I'm going to do is grant probation on the Class A felony. I am not going to grant probation on the Class B, C, or E felonies which by doing this it is my intent that the controlling term would be the five to twenty years for aggravated sodomy. I have been informed by the office of corrections that with maximum good time behavior in prison on the five to twenty year term that Mr. Dubish would be eligible to go before the parole board in three years, six months and twenty-two days of serving time. Taking the seven months that he's already served off of that, that would necessitate serving three years approximately from this date before you can go before the parole board. I believe that this kind of sentence, this five to twenty sentence, with this understanding of good time behavior, when your record and your history and all of these facts and the information of the whole matter can be presented to the parole board, I believe that this more closely corresponds to the nature of the offense that did take place." *State v. Dubish II, supra,* at 849.

On May 26, 1983, the sentencing judge of the District Court of Lyon County, Kansas set aside the May 3 order granting probation, determining that he lacked jurisdiction to make or enter any order with respect to Appellant's

motion for probation while an appeal was docketed with Supreme Court. *Id.*

On January 13, 1984, the Supreme Court filed its opinion in *State v. Dubish I, supra.* Appellant's conviction for the offense of aggravated sodomy was set aside because the statute in effect, K.S.A. 21-3505, did not permit a husband to be convicted of committing the crime of sodomy or aggravated sodomy against his wife. The other convictions were affirmed.

After receiving the mandate, Appellant filed a motion for modification of sentence and probation on February 14, 1984 before the sentencing judge of the District Court of Lyon County, Kansas. On March 7, 1984, the sentencing judge denied Appellant's request for modification of sentence, stating that he was now confronted with a different situation. If probation were granted on the life sentence, the controlling term of the Appellant's sentence became three to ten years for the offense of aggravated battery rather than five to twenty years, because the aggravated sodomy conviction had been set aside on appeal. *State v. Dubish II, supra,* at 849-850.

Appellant appealed from the trial court's denial of modification of sentence on March 7, 1984. He contended that the grant of probation entered on May 3, 1983 by the sentencing judge of the District Court of Lyon County, Kansas, was valid, notwithstanding an appeal was pending, and that probation could not be revoked unless appellant failed to abide by its terms and conditions. *Id.* at 850.

On Appellant's appeal of March 7, 1984, the Supreme Court considered statutes and decisions pertaining to probation and determined a sentencing judge is not empowered to grant probation to a defendant on one conviction and imprison the defendant for other convictions if all arose

out of the same incident. The opinion in *State v. Dubish II, supra*, was filed on March 2, 1985. *Id.* at 852-855.

Appellant, on September 15, 1986, then filed his motion attacking sentence under K.S.A. 60-1507, challenging the constitutionality of K.S.A. 21-4501, 21-3420 and 21-3421. On November 4, 1986, the District Court heard arguments of counsel and denied Appellant's motion by ruling from the bench. This ruling was subsequently reduced to a Journal Entry filed on December 15, 1986. Appendix, p. A10. A corrected Journal Entry was filed on January 26, 1987. Appendix, p. A12. The District Court held K.S.A. 21-3421 and the attendant punishment statute, K.S.A. 21-4501 not to be unconstitutional and not in violation of the Eighth Amendment of the United States Constitution.

Notice of Appeal was timely filed on January 12, 1987, and the case was docketed in the Appellate Courts.

On September 1, 1987, the Kansas Court of Appeals heard arguments of counsel and denied Appellant's K.S.A. 60-1507 Motion attacking sentencing. (Court of Appeals Memorandum Opinion, No. 60,449, September 10, 1987). Appendix, p. A5.

The memorandum opinion filed by the Kansas Court of Appeals held that the K.S.A. 60-1507 Motion attacking sentencing could not raise the issue of the constitutionality of the Aggravated Kidnapping Statute, K.S.A. 21-3421. The Court stated that since the issue was not raised in two previous appeals filed by the Appellant and the Appellant did not make a showing of exceptional circumstances, the K.S.A. 60-1507 Motion attacking sentencing cannot be a substitute for a direct appeal involving trial errors or as a substitute for a direct appeal. Court of Appeals Memorandum Decision, No. 60,449 and Supreme Court Rule 183(c)(3). Appendix, p. A5.

The issue again was raised in the Appellant's petition for review to the Kansas Supreme Court. The question presented was whether or not the Kansas aggravated kidnapping statute and sentencing statutes were constitutional. The petition for review requested the Supreme Court of the State of Kansas to review the decision of the Kansas Court of Appeals. Also raised in Appellant's petition for review to the Supreme Court was whether the Appellant's federal due process rights were violated through wrongful application of Kansas Supreme Court Rule 183 (c) (3) to Appellant's K.S.A. 60-1507 Motion attacking sentencing.

The Kansas Supreme Court denied the petition to review the decision of the Kansas Court of Appeals. Appendix, p. A4.

SUBSTANTIALITY OF QUESTIONS PRESENTED

The Kansas Courts have decided a federal question in conflict with applicable decisions of the United States Supreme Court.

The United States Supreme Court has held that a sentence must be proportionate to the crime charged. In so doing, the United States Supreme Court has set forth the criteria which is imposed to determine proportionality: (1) "the gravity of the offense and the harshness of the penalty," (2) "the sentences imposed on other criminals in the same jurisdiction, that is, whether more serious crimes are subject to the same penalty or less serious penalities and (3) "the sentences imposed for commission of the same crime in other jurisdictions." The Court also notes other accepted factors for determining proportionality including, (1) the magnitude of the crime; (2) the culpability of the offender; (3) the

harm caused or threatened to the victim or society and; (4) the motive of the person committing the crime. The United States Supreme Court has also determined that a determination of proportionality must be determined on a case by case basis in the particular context of each case. *Solem v. Helm,* 463 U.S. 277, 77 L. Ed. 2d 637, 103 S. Ct. 3001 (1983).

Other decisions of the United States Supreme Court have held punishment should be graduated and proportionate to the offense and be in accord with the dignity of man in favor of rehabilitation. *Weems v. United States,* 217 U.S. 349, 54 L. Ed. 793, 30 S. Ct. 544 (1910) and *Trop v. Dulles,* 356 U.S. 86, 2 L. Ed. 2d 630, 78 S. Ct. 590 (1958).

Punishment has been found to be excessive where it makes no measurable contribution to the legislative goals of punishment and when punishment exceeds the goal of rehabilitation or protection of society, it becomes a pointless infliction of pain and suffering. The Eighth Amendment has also been held to be a legitimate restraint on the legislature's power. *Gregg v. Georgia,* 428 U.S. 153, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976).

An opinion was rendered in the highest state court available to appellant to-wit: the Kansas Court of Appeals. The appellant petitioned the Kansas Supreme Court for review of this opinion but was denied review.

The Kansas Court of Appeals, in rendering its decision, did not address nor render an opinion on the issue of whether the Aggravated Kidnapping Statute of Kansas, a Class A felony and under which appellant was sentenced, was in violation of the Eighth Amendment to the United States Constitution. The Kansas Court of

Appeals instead held appellant was not entitled to bring a K.S.A. 60-1507 Motion attacking sentencing as a substitute for a direct appeal as this was a trial error and to now raise what he could have raised on direct appeal is not allowed. The Court of Appeals' decision was based on Kansas Supreme Court Rule 183(c)(3) which states:

> "(A) Proceeding under K.S.A. 60-1507 cannot ordinarily be used as a substitute for direct appeal involving mere trial errors or as a substitute for a second appeal. Mere trial errors are to be corrected by direct appeal, but trial errors affecting constitutional rights may be raised even though the error could have been raised on appeal, provided there were exceptional circumstances excusing the failure to appeal."

The Kansas Court of Appeals applied the procedural bar of Kansas Supreme Court Rule 183(c)(3) by stating this was a trial error which only could be raised by direct appeal without determination of whether a constitutional error had occurred which could be raised on appeal. Before applying the bar of Rule 183(c)(3), the Kansas Court of Appeals was required to rule whether the rights of appellant were of constitutional magnitude and trial errors affecting constitutional rights to overcome the procedural bar of the Kansas Supreme Court Rule 183(c)(3). *In Re: Gilchrist*, 238 Kan. 202, 206, 708 P.2d 977 (1985).

The United States Supreme Court has jurisdiction where resolution of the state procedural law question depends on a federal constitutional ruling and where the nonfederal ground is so interwoven with the federal ground as not to be an independent matter. *Enterprise*

Irrigation District v. Farmers Mutual Canal Company, 243 U.S. 157, 61 L. Ed. 644, 37 S. Ct. 318 (1917) and *Ake v. Oklahoma*, 470 U.S. 68, 84 L. Ed. 2d 53, 105 S. Ct. 1087.

The Kansas Court of Appeals' opinion not allowing a decision on the merits, but based only on Kansas Supreme Court Rule 183(c)(3), a procedural rule, was challenged by the appellant in his petition for review to the Kansas Supreme Court. In his petition for review, the appellant asserted federal constitutional questions pertaining to the Eighth Amendment to the United States Constitution and the Fourteenth Amendment to the United States Constitution, pertaining to due process. The validity of the state statutes of Kansas on aggravated kidnapping and sentencing statute were properly presented to the Kansas Supreme Court in appellant's petition for review. The Court was required to address the merits of appellant's argument as to constitutional trial errors in reaching its decision. See, *New York, Ex Rel., Bryant v. Zimmerman*, 278 U.S. 63, 73 L. Ed. 184, 49 S. Ct. 61 (1928) 62 A.L.R. 785.

The decision of the Kansas Court of Appeals holding the appellant should have raised his constitutional arguments on direct appeal pursuant to Kansas Supreme Court Rule 183(c)(3) and treating questions as raised as mere trial errors was not to be reasonably anticipated by the appellant. Kansas Supreme Court Rule 183(c)(3) disallows a K.S.A. 60-1507 Motion attacking sentencing where appellant could have brought a direct appeal based on mere trial errors. Appellant's contention in his K.S.A. 60-1507 Motion attacking sentencing, his appeal of said motion and his petition for review were based on violation of his Eighth Amendment rights to be free from

cruel and unusual punishment and his Fourteenth Amendment right of due process and do not constitute mere trial errors but constitutional trial error and as such the appellant need not show exceptional circumstances to allow his K.S.A. 60-1507 Motion attacking sentencing. That appellant's federal due process rights were violated for failure of the Kansas Court of Appeals and the Kansas Supreme Court to reach and decide the federal constitutional issue and errors before making their decisions on procedural trial errors. The United States Supreme Court has held a question is properly presented where a petition for rehearing is filed and the petition to review the lower court's decision involves a question which could not have been reasonably anticipated in the lower courts. *Missouri Insurance Company v. Gehner*, 281 U.S. 313, 74 L. Ed. 870, 50 S. Ct. 326 (1930). The appellant has properly raised a federal constitutional question which has not been addressed by the Courts of Kansas on appeal and review.

CONCLUSION

The substantial nature of appellant's constitutional rights which are being violated through the enforcement of the Kansas Statutes pertaining to aggravated kidnapping and the punishment therefor, requires the court to allow oral argument and briefs and that plenary consideration be given to the issues involved in this appeal.

The Eighth Amendment forbids punishment which is either cruel or unusual. The Supreme Court has interpreted this amendment to disallow sentences disproportionate to the crime charged. The sentence of life imprisonment for the crime of aggravated kidnapping, based on the facts of this case, constitutes cruel and unusual punishment in violation of the appellant's constitutional rights and as such is not a mere trial error.

The Courts of Kansas on appeal and review failed to address the issue of the constitutionality of the aggravated kidnapping statute and punishment, therefore, at any point or time before determining its appeal and review and based its decision on procedural trial errors and not constitutional trial errors.

Respectfully submitted,

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APPENDIX "A"

(Filed December 17, 1987)

IN THE SUPREME COURT OF THE STATE OF KANSAS

Kansas Case No. 87-60449-A

ANDREW T. DUBISH,
Plaintiff/Appellant,

vs.

THE STATE OF KANSAS,
Defendant/Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that ANDREW T. DUBISH, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Kansas entered in this proceeding on November 16, 1987, denying appellant's petition for review of the decision of the Court of Appeals of the State of Kansas, upholding the constitutionality of the Kansas aggravated kidnapping statute, K.S.A. 21-3421, and the sentencing provisions thereunder of life imprisonment for committing said crime. It is the contention of the appellant that the punishment does not fit the crime and constitutes cruel and unusual punishment proscribed by the Eighth Amendment to the Constitution of the United States and Section Nine of the Kansas Bill of Rights.

This appeal is taken pursuant to Title 28, United States Code Section 1257, subparagraph 2.

Dated December 15, 1987.

/s/ David K. Clark
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AFFIDAVIT OF SERVICE BY MAIL

STATE OF KANSAS)
) SS:
COUNTY OF WILSON)

I, DAVID K. CLARK, depose and say that I am the attorney of record for ANDREW T. DUBISH, the appellant, and that on December 15, 1987, pursuant to Rule 28, Rules of the Supreme Court, I served upon RODNEY H. SYMMONDS, Lyon County Attorney representing the State of Kansas, appellee herein, three (3) copies of the foregoing NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES by mailing the copies in a duly addressed envelope with first class postage prepaid to: RODNEY H. SYMMONDS, Lyon County Courthouse, Emporia, Kansas 66801, counsel of record for the State of Kansas, and that I served true and correct copies of said NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES by depositing the same in the United States mail at Fredonia, Kansas, in sealed envelopes, postage prepaid, addressed to the Clerk of the Court of Appeals, Kansas Judicial Center, 301 West 10th Street, Topeka, Kansas 66612-1507; Clerk of the District Court,

Lyon County Courthouse, Emporia, Kansas 66801; ROBERT STEPHAN, Attorney General, 2nd Floor, Kansas Judicial Center, 301 West 10th Street, Topeka, Kansas 66612; and that I mailed the original of the NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES to the Clerk of the Supreme Court of the State of Kansas, Kansas Judicial Center, 301 West 10th Street, Topeka, Kansas 66612-1507.

All parties required to be served have been served in a timely manner.

/s/ David K. Clark
David K. Clark

SUBSCRIBED AND SWORN TO before me this 15th day of December, 1987.

/s/ Annette L. Black
Annette L. Black, Notary Public

(Seal)

My Appointment Expires:
July 19, 1989

APPENDIX "B"

(Dated November 16, 1987)

IN THE
SUPREME COURT OF THE STATE OF KANSAS

No. 87-60449-A

Andrew T. Dubish,
Appellant,

v.

State of Kansas,
Appellee.

You are hereby notified of the following action taken in the above entitled case:

Petition for review.

Considered by the court and denied.

Yours very truly,

Lewis C. Carter
Clerk, Supreme Court

Date November 16, 1987

APPENDIX "C"

(Filed September 10, 1987)

NOT DESIGNATED FOR PUBLICATION
No. 60,449

IN THE
COURT OF APPEALS OF THE STATE OF KANSAS

ANDREW T. DUBISH,
Appellant,

v.

STATE OF KANSAS,
Appellee.

MEMORANDUM OPINION

Appeal from Lyon District Court: WILLIAM J. DICK, judge. Opinion filed September 10, 1987. Affirmed.

David K. Clark, of Fredonia, for the appellant.

Rodney H. Symmonds, county attorney, and *Robert T. Stephan,* attorney general, for the appellee.

Before DAVIS, P.J., REES and BRISCOE, JJ.

PER CURIAM: The petitioner, Andrew T. Dubish, appeals from the district court's denial of his K.S.A. 60-1507 motion.

The sole issue raised by petitioner is whether the sentence of life imprisonment imposed after his conviction of aggravated kidnapping constitutes cruel and unusual

punishment under the Eighth Amendment to the United States Constitution and Section Nine of the Bill of Rights of the Kansas Constitution. The specific statute which petitioner contends is unconstitutional is K.S.A. 21-3421, which provides:

> "Aggravated kidnapping is kidnapping, as defined in section 21-3420, when bodily harm is inflicted upon the person kidnapped.
>
> "Aggravated kidnapping is a class A felony."

K.S.A. 21-4501 provides that the sentence for class A felonies is life imprisonment.

On January 26, 1983, petitioner was convicted of aggravated kidnapping (K.S.A. 21-3421), aggravated sodomy (21-3506), aggravated battery (21-3414), and making a terroristic threat (21-3419). He was sentenced on February 16, 1983, to a life term of imprisonment for the aggravated kidnapping, not less than five nor more than twenty years for the aggravated sodomy, not less than three nor more than ten years for the aggravated battery, and not less than one nor more than two years for the terroristic threat. A direct appeal was taken from these convictions on February 25, 1983. Numerous issues were raised in this appeal. The issue presently urged by petitioner in his 1507 was not included in the issues presented in his direct appeal. The Supreme Court set aside petitioner's aggravated sodomy conviction after determining the statute in effect at the time. K.S.A. 21-3505, did not permit a husband to be convicted of sodomy or aggravated sodomy of his wife. *State v. Dubish,* 234 Kan. 708, 675 P.2d 877 (1984). The remainder of petitioner's convictions, including his aggravated kidnapping conviction, were affirmed.

Less than three months after sentencing, and while the case was pending on appeal, the district court granted petitioner probation on the aggravated kidnapping conviction. Soon thereafter, the district court set aside its order after determining it lacked jurisdiction to enter an order with respect to petitioner's motion for probation while the petitioner's direct appeal was pending. After the Supreme Court rendered its decision in the direct appeal, petitioner filed a motion for modification of sentence with the district court. In his motion, petitioner argued the district court's earlier grant of probation was valid and could not be revoked unless he failed to abide by its terms and conditions. The district court denied petitioner's motion to modify his sentence, stating it was now confronted with a different situation. If probation were granted on the life sentence, the controlling term of petitioner's sentence would be three to ten years because the aggravated sodomy conviction with its sentence of five to twenty years had been set aside. Petitioner appealed the denial of his motion to modify.

In petitioner's second appeal, the Supreme Court considered the statutes and decisions pertaining to probation, and determined a sentencing judge has no jurisdiction to manipulate the eligibility date for release of a person sentenced to the custody of the Secretary of Corrections by granting probation on certain convictions and imposing incarceration on others. *State v. Dubish,* 236 Kan. 848, 855, 696 P.2d 969 (1985). In petitioner's second appeal, he did not present the issue he presently urges in this 1507.

Supreme Court Rule 183(c)(3), 235 Kan. cxviii, provides:

> "[A] proceeding under section 60-1507 cannot ordinarily be used as a substitute for direct appeal involving mere trial errors or as a substitute for a second appeal. Mere trial errors are to be corrected by direct appeal, but trial errors affecting constitutional rights may be raised even though the error could have been raised on appeal, *provided there were exceptional circumstances excusing the failure to appeal.*" Emphasis added.

Exceptional circumstances are most often found where there has been an intervening change in the law. *White v. State,* 222 Kan. 709, 712, 568 P.2d 112 (1977); *Tucker v. State,* 11 Kan. App. 2d 51, 53, 711 P.2d 1343 (1986).

In the present case, petitioner has neither alleged nor shown exceptional circumstances which would excuse him from not including the issue of whether a life sentence imposed for a conviction of aggravated kidnapping constitutes cruel and unusual punishment in either of his prior appeals. Petitioner has presented no change in the law which would justify our now entertaining an issue which was available for appeal when petitioner's prior appeals were filed. Petitioner's second appeal even dealt with the same argument he now urges—that imposition of a life sentence for his conviction of aggravated kidnapping is too extreme and should be reduced, or somehow nullified.

We must affirm the trial court's denial of petitioner's 1507 motion. Absent petitioner's showing of exceptional circumstances excusing his failure to appeal the statute's constitutionality in either of his prior appeals, his 1507 motion cannot be used as a substitute for a direct appeal to now raise what he could have raised before. Supreme

Court Rule 183(c)(3); *Kirk v. State,* 220 Kan. 278, 552 P.2d 633 (1976); *Tillman v. State,* 215 Kan. 365, 524 P.2d 772 (1974); *Jones v. State,* 3 Kan. App. 2d 578, 579, 598 P.2d 565, *rev. denied* 226 Kan. 792 (1979). Although the district court denied petitioner's 1507 after reaching the merits, we still must affirm. If a trial court renders the correct judgment, the judgment will not be disturbed merely because the wrong reasons were given for its rendition. *Micheaux v. Amalgamated Meatcutters & Butcher Workmen,* 231 Kan. 791, 798, 648 P.2d 722 (1982); *Aeronautical Dist. Lodge No. 70 v. Beech Aircraft Corp.,* 8 Kan. App. 2d 703, 709, 666 P.2d 1204 (1983).

Affirmed.

APPENDIX "D"

(Filed January 26, 1987)

IN THE
DISTRICT COURT OF LYON COUNTY, KANSAS

Case No. 86 C-233

ANDREW T. DUBISH,
Movant,

vs.

THE STATE OF KANSAS,
Respondent.

NUNC PRO TUNC JOURNAL ENTRY

NOW, on this 4th day of November, 1986, this matter comes on before the above-named Court for hearing on Movant's motion filed pursuant to K.S.A. 60-1507. The honorable WILLIAM J. DICK, Associate District Judge, presiding. The STATE OF KANSAS appears by and through RODNEY H. SYMMONDS, Lyon County Attorney. LEON B. GRAVES and DAVID K. CLARK appear as counsel for movant.

THEREUPON, the parties make argument in support of their respective positions.

THEREUPON, the Court finds K.S.A. 21-3421 is constitutional and further finds the Movant's motion for relief pursuant to K.S.A. 60-1507 should be denied.

IT IS SO ORDERED.

/s/ William J. Dick
William J. Dick
Associate District Judge

APPROVED BY:

/s/ R
Rodney H. Symmonds
Lyon County Attorney
Lyon County Courthouse
Emporia, Kansas 66801
/s/ David K. Clark
Law Offices of David K. Clark
609 Monroe, P. O. Box 70
Fredonia, Kansas 66736

(Certificate of the Clerk Omitted in Printing)

APPENDIX "E"

(Filed December 15, 1986)

IN THE
DISTRICT COURT OF LYON COUNTY, KANSAS
CRIMINAL DIVISION

No. 86C233

THE STATE OF KANSAS,
Movant,

vs.

ANDREW T. DUBISH,
Respondent.

JOURNAL ENTRY

NOW, on this 4th day of November, 1986, this matter comes on before the above-named Court for hearing on petitioner's motion filed pursuant to K.S.A. 60-1507. The Honorable William J. Dick, Associate District Judge, presiding. The State of Kansas appears by and through Rodney H. Symmonds, Lyon County Attorney. Leon Graves and David Clark appear as counsel for petitioner.

THEREUPON, the parties make argument in support of their respective positions.

THEREUPON, the Court finds K.S.A. 60-1507 is constitutional and further finds the petitioner's motion for relief pursuant to K.S.A. 60-1507 should be denied.

IT IS SO ORDERED.

/s/ William J. Dick
William J. Dick
Associate District Judge

SUBMITTED & APPROVED:

/s/ R
Rodney H. Symmonds
Lyon County Attorney
Lyon County Courthouse
Emporia, KS 66801

APPROVED:

/s/ Leon B. Graves
Leon Graves
Law Offices of David K. Clark
Attorneys at Law
609 Monroe, P.O. Box 70,
Fredonia, KS 66736

(Certificate of the Clerk Omitted in Printing)

APPENDIX "F"

(Filed February 24, 1987)

IN THE
DISTRICT COURT OF LYON COUNTY, KANSAS
STATE OF KANSAS
5th JUDICIAL DISTRICT

Case No. 86C233

ANDREW T. DUBISH,
Petitioner,

vs.

STATE OF KANSAS,
Defendant.

TRANSCRIPT

Proceedings had before the HONORABLE WILLIAM J. DICK, JUDGE, at Emporia, Kansas, on the 4th day of November, 1986.

APPEARANCES

The plaintiff appeared by his attorneys, Mr. David K. Clark and Mr. Leon Graves, Attorneys at Law, Law Offices of David K. Clark, 609 Monroe, Fredonia, Kansas, 66736.

The defendant appeared by its attorney, Mr. Rodney H. Symmonds, Lyon County Attorney, Lyon County Courthouse, Emporia, Kansas 66801.

* * *

* * * [8] the State's position that, obviously, the same, when applied to the circumstances in this particular case or in any other case, does not in and of itself constitute cruel and unusual punishment such as to make the statutory provisions unconstitutional. Thank you.

THE COURT: Thank you. Mr. Graves, did you have anything else, then?

MR. GRAVES: Nothing further at this time, Your Honor.

THE COURT: I will take a short recess to finish reading your brief here, Mr. Graves. So, we'll take about a ten minute recess.

(Whereupon a short recess was taken)

(THEREUPON, on the 4th day of November, 1986, with all parties as heretofore present the following further proceedings were had:)

THE COURT: Gentlemen, let the record show at this time that I have had an opportunity to examine your brief, Mr. Graves, and the materials you have handed to me and the statute, also. The Court finds that this matter comes on under or pursuant to 1507, challenging the constitutionality of the aggravated kidnapping statute, that statute being K.S.A. 21-3421. On the basis of the proportionality of [9] sentences under the Eighth Amendment of the U.S. Constitution and Section Nine of the Kansas Bill of Rights, the Court notes that 21-3421 has been the law in this state since 1970, that being the effective date of the criminal code that we now have in Kansas. In this code concerning kidnapping and aggravated kidnapping the legislature categorized those two offenses with aggravated kidnapping being kidnapping

where bodily harm is inflicted on the person kidnapped. That seems to be a logical categorization, that being a class "A" felony and kidnapping being a class "B" felony. In this case Mr. Dubish was found guilty by jury verdict of aggravated kidnapping after the court instructed the jury and those instructions have been made available to The Supreme Court in the prior appeals. It would seem in this case on this question that because an injury is caused in a particular case, that injury being less than injuries received by the victim in other cases; that because there is a difference in injuries that there should be further categorization or less severe penalties are not such that they would seem to cause a finding that the statute would be unconstitutional because of the proportionality of sentences. So, from examining and considering the question raised by counsel in this matter, the Court finds that the statute is constitutional and does deny the motion. Mr. Symmonds, if you would prepare a journal entry on that.

(END OF PROCEEDINGS)

* * *

* * * [11] proceedings had in or at the trial of the foregoing cause in said court; and that said tape recording constituting the official record has been at all times in the custody and/or under the control of the Lyon County District court.

Dated this 24th day of February, 1987.

/s/ William J. Dick
District Judge

APPENDIX "G"

No. 56,872

STATE OF KANSAS,
Appellee,

v.

ANDREW T. DUBISH,
Appellant.
(696 P.2d 969)

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Probation.* Probation is defined by K.S.A. 1984 Supp. 21-4602(3) as a procedure whereby a defendant, after being found guilty of a crime, is released by the court *after imposition of sentence,* without imprisonment.

2. SAME—*Probation.* Probation is an act of grace and the power to grant that act is provided by the legislature to the court. Probation is separate and distinct from sentence.

3. SAME—*Sentencing—Restrictions Placed on Sentencing Judge with Regard to Granting Probation.* A sentencing judge has no jurisdiction to manipulate the eligibility date for release of a person sentenced to the custody of the Secretary of Corrections by granting probation on certain convictions and imposing incarceration on others.

Appeal from Lyon district court, WILLIAM J. DICK, judge. Opinion filed March 2, 1985. Affirmed.

Don W. Lill, of Emporia, argued the cause and was on the brief for appellant.

Rodney H. Symmonds, county attorney, argued the cause, and *Robert T. Stephan,* attorney general, was with him on the brief for appellee.

The opinion of the court was delivered by

LOCKETT, J.: After Andrew T. Dubish was convicted of aggravated kidnapping, aggravated sodomy, aggravated battery and making a terroristic threat, he appealed his conviction. Subsequent to the filing of the appeal, the district court granted Dubish probation on the aggravated kidnapping. Later the district court reversed itself and set aside the order of probation claiming it was without jurisdiction to grant probation during the pendency of an appeal. After the appeal process had been completed and the mandate received, Dubish petitioned to the court again for probation. The district court denied probation. Dubish appeals the court's order setting aside probation and its subsequent orders denying probation.

Andrew T. Dubish was convicted by a jury on January 26, 1983, of the offense of aggravated kidnapping, aggravated sodomy, aggravated battery, and making a terroristic threat. Dubish was sentenced on February 16, 1983, to serve a life sentence for the aggravated kidnapping, five to twenty years for aggravated sodomy, three to ten years for aggravated battery, and one to two years for making a terroristic threat, all to be served concurrently.

On February 25, 1983, defendant filed a Notice of Appeal to the Supreme Court on these convictions. On April 5, 1983, defendant filed a motion for modification of sentence and probation.

The sentencing judge, during the hearing on defendant's motion for probation, made the following statement in reference to Dubish's life sentence which had been imposed for the aggravated kidnapping:

> "But I am also gravely concerned for taking 15 years, at least 15 years, out of the life of this man for this occurrence. I feel that Mr. Dubish should serve some time. He's served seven months to this time. I feel that he should serve some more time because of the seriousness of this offense, but I cannot in good conscience state that he should serve at least 15 years out of his life.
>
> "So on this motion we have four felonies for which sentences have been imposed, and what I'm going to do is grant probation on the class A felony. I am not going to grant probation on the class B, C, or E felonies which by doing this it is my intent that the controlling term would be the five to 20 years for aggravated sodomy. I have been informed by the office of corrections that with maximum good time behavior in prison on the five to 20 year term that Mr. Dubish would be eligible to go before the parole board in three years, six months and 22 days of serving time. Taking the seven months that he's already served off of that, that would necessitate serving three years approximately from this date before you can go before the parole board. I believe that this kind of sentence, this five to 20 sentence, with this understanding of good time behavior, when your record and your history and all of these facts and the information of the whole matter can be presented to the parole board, I believe that this more

closely corresponds to the nature of the offense that did take place."

On May 26, 1983, the sentencing judge set aside the May 3 order granting probation determining he lacked jurisdiction to make or enter any order with respect to the defendant's motion for probation while Dubish's appeal was docketed with the Supreme Court.

On January 13, 1984, this court filed its opinion in *State v. Dubish,* 234 Kan. 708, 675 P.2d 877 (1984). Dubish's conviction for the offense of aggravated sodomy was set aside because the statute in effect at the time, K.S.A. 21-3505, did not permit a husband to be convicted of committing the crime of sodomy or aggravated sodomy against his wife. After receiving the mandate, the defendant filed a motion for modification of sentence and probation on February 14, 1984. On March 7, 1984, the sentencing judge denied defendant's request for modification of sentence or probation, stating that he was now confronted with a different situation. If probation were granted on the life sentence, the controlling term of the defendant's sentence became three to ten years for the offense of aggravated battery, rather than five to twenty years, since the aggravated sodomy conviction had been set aside by this court.

The defendant argues that the trial court retained jurisdiction to grant probation at the hearing on May 3, 1983, even though the case had been appealed to the Supreme Court on February 25, 1983. Dubish contends that the grant of probation was valid and could not be revoked unless he had failed to abide by its terms and conditions. The State argues that the court never had jurisdiction to grant probation.

The sentencing judge and the State both mistakenly relied on *State v. Dedman,* 230 Kan. 793, 640 P.2d 1266 (1982), to support their claim that the sentencing judge lacked jurisdiction to grant probation while an appeal is pending. In *Dedman,* one of the points on appeal was whether the 120-day period given the trial court to modify a sentence was suspended when the defendant appeals from that sentence. K.S.A. 1980 Supp. 21-4603(2) (now 21-4603[3]) contemplated appeals within the 120-day period. The trial judge correctly determined that when Dedman appealed the sentence itself, after the appeal had been docketed, the trial court's jurisdiction to modify the sentence was suspended. The sentence could be modified only after the mandate from the Supreme Court or the Court of Appeals was returned or by motion to remand temporarily to the sentencing court for modification of the sentence.

Prior to 1966 when an individual, following a conviction and sentence in the district court, voluntarily made application for probation, he acquiesced in the judgment, recognizing its validity. That recognition of a valid judgment precluded his right to appeal. *State v. Mooneyham,* 192 Kan. 620, 390 P.2d 215 (1964). Subsequently, the "*Mooneyham* Rule" was reversed by *State v. McCarther,* 197 Kan. 279, 416 P.2d 290 (1966). This court recognized that when a defendant in a criminal action made application for probation, he was not acquiescing in the judgment of the conviction and he maintained the right to appeal. The court's position was later codified by the legislature. Our statutes now offer an individual convicted of a crime both the right to an appeal of the conviction and the possibility of release from imprisonment. K.S.A. 1984 Supp. 21-4603 provides in part that the application

for or acceptance of probation or a suspended sentence does not constitute an acquiescence in the judgment for the purpose of appeal. The right of *appeal continues* without regard to whether the convicted person *has applied* for a probation or a suspended sentence.

The power to grant probation is dependent upon statutory provisions. In the absence of a controlling statute, the trial court is without judicial power to defer the imposition of a sentence and to place the defendant, who has been convicted, on probation. Under our statutes and case law, the jurisdiction to grant probation and deal with probation matters lies specifically with the trial court. *State v. Yost,* 232 Kan. 370, 654 P.2d 458 (1982).

Probation is defined by K.S.A. 1984 Supp. 21-4602(3) as a procedure whereby a defendant, after being found guilty of a crime, is released by the court *after imposition of sentence,* without imprisonment. The definition of probation and 21-4603 make it clear that probation in no way actually affects the sentence. The final judgment in a criminal case is the sentence and, by placing the defendant on probation, the trial court does not affect the finality of the judgment.

Other jurisdictions have considered the question of whether a trial court has authority to grant or modify probation or a suspension of sentence after the filing of an appeal. Those jurisdictions have determined that probation is separate and distinct from the sentence, and that the jurisdiction to grant probation lies exclusively in the trial court. See *United States v. Lindh,* 148 F.2d 332 (3rd Cir. 1944); *People v. Dillon,* 655 P.2d 841, 848 (Colo. 1982) (Quinn, J., dissenting); *Burden v. State,* 634 S.W.2d 349 (Tex. App. 1982).

Probation is an act of grace and the power to grant that act is provided by the legislature to the court. Probation is separate and distinct from sentence. Here, the sentencing judge was incorrect when he determined that he had no authority to grant or modify conditions of probation during the pendency of the appeal.

Dubish claims that the failure of the sentencing judge to again grant him probation from the life sentence after a successful appeal of his case was a violation of his due process rights. The State argues that the defendant's due process rights were not violated because his sentence was in no way affected by the granting or denial of probation.

Dubish relies upon *North Carolina v. Pearce,* 395 U.S. 711, 23 L.Ed.2d 656, 89 S.Ct. 2072 (1969). Pearce was tried, convicted and sentenced. He appealed, the conviction was reversed and the case was remanded for a new trial. Pearce was retried, convicted a second time and sentenced to a new prison term which, when added to the time he had already spent in prison, amounted to a longer total sentence than the one originally imposed. The United States Supreme Court determined it would be a flagrant violation of the due process clause of the 14th Amendment for a state trial court to impose a heavier sentence upon a reconvicted defendant for the explicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside. Such a policy would serve to "chill the exercise of basic constitutional rights." 395 U.S. at 724.

In the present case, Dubish was not retried and then resentenced. The judge's refusal to grant probation on Dubish's second motion for probation in no way affected the term of his sentence. *Pearce* specifically applies to resentencing of an individual who, after successfully hav-

ing his conviction set aside on appeal, is tried again, convicted and then resentenced to a longer length of time.

Here, the record clearly shows that the court carefully considered and denied probation on March 7, 1984. Even though the judge's reason was incorrect for determining that the original grant of probation from the life sentence was void, when denying probation at the second hearing he again considered all the statutory factors for imposing a sentence or granting probation. He then determined that because of the seriousness of the offense, Dubish should serve more than the minimum three to ten years for the class C felony conviction prior to being eligible for parole and denied Dubish's request for probation from the aggravated kidnapping conviction.

Can a sentencing judge grant probation on one conviction and imprison the individual for other convictions arising out of the same incident?

The Kansas Legislature enacted Art. 46, Ch. 21 of the Kansas Statutes Annotated in order that persons convicted of crime shall be dealt with in accordance with their individual characteristics, circumstances, needs, and potentialities. Dangerous offenders are to be correctively treated in custody for long terms as needed; other offenders shall be dealt with by probation, suspended sentence, or fines whenever such disposition appears practical and not detrimental to the needs of public safety and the welfare of the offender, or shall be committed for at least the minimum term within the limits provided by law. K.S.A. 21-4601.

Whenever any person has been found guilty of a crime, the legislature has granted the sentencing judge the power to do the following: (a) commit the defen-

dant to the custody of the Secretary of Corrections or, if confinement is for less than one year, to jail; (b) impose the fine applicable to the offense; (c) release the defendant on probation subject to such conditions as the court may deem appropriate; (d) suspend the imposition of the sentence subject to such conditions as the court may deem appropriate; or (e) impose any appropriate combination of (a), (b), (c), and (d).

The fundamental rule of statutory construction is that the purpose and intent of the legislature governs when that intent can be ascertained from the statute. In construing statutes, the legislative intention is to be determined from a general consideration of the entire act. Effect must be given, if possible, to the entire act and every part thereof. To this end it is the duty of the court, as far as practicable, to reconcile the different provisions so as to make them consistent, harmonious, and sensible. *State v. Flummerfelt*, 235 Kan. 609, 684 P.2d 363 (1984). K.S.A. 1984 Supp. 21-4603, which grants the sentencing judge the power to commit the defendant to the custody of the Secretary of Corrections, impose a fine, release the defendant on probation subject to such conditions as the court may deem appropriate, or suspend the imposition of sentence is limited because the sentencing judge is limited to imposing any appropriate combination.

The basic purpose for probation is to provide a program whereby an individual is given the opportunity to rehabilitate himself without institutional confinement under the supervision of a probation official and under the continuing power of the district court to impose institutional punishment for the original offense if the pro-

bationer abuses this opportunity. It permits the sentencing judge to give a convicted person the opportunity to mend his ways and have his freedom under conditions imposed. Probation is not granted out of a spirit of leniency, but is granted as a result of the evaluation of the characteristics of the offender and a determination that the offender may respond best to supervised control within the community and that public safety will not be endangered. On the other hand, confinement is for individuals who are required to be isolated from the community in order to protect society or to provide a closely controlled environment for individuals who can learn to adjust their attitude or behavior for later release into the community. Confinement may serve as a deterrent to others in the community.

It is obvious that the sentencing judge never considered granting probation to Dubish. The judge was attempting to manipulate Dubish's eligibility date for release from the custody of the Secretary of Corrections. Such intent is shown not only by the judge's statements at the hearing held on March 7, 1984, but also the sentencing judge's disregard of the legislative intent and the statutory requirements for granting probation. Initially, the sentencing judge committed the defendant to the custody of the Secretary of Corrections as provided by 21-4603 (2) (a) for his convictions of the offenses of aggravated sodomy, aggravated battery and making a terroristic threat and granted Dubish probation on the conviction of aggravated kidnapping pursuant to 21-4603(2) (c).

In applying 21-4603(2) (e), a sentencing judge may only impose sentences that are "appropriate." When the legislature used the word "appropriate" in the statute,

it implied that the combination of penalties under that statute should be harmonious. Therefore, a sentencing judge may not impose imprisonment, which mandates incarceration, with either probation or suspension of sentence, which requires release of the individual subject to conditions imposed by the court under the supervision of the probation service.

In *State v. Chilcote*, 7 Kan. App. 2d 685, 647 P.2d 1349, *rev. denied* 231 Kan. 801 (1982), one of Chilcote's complaints was that the sentence imposed was excessive and not justified by law. The trial judge, after incarcerating Chilcote, in addition ordered him to pay restitution. Chilcote argued that the court's order of restitution under 21-4603(2)(c) and (d) in conjunction with incarceration under 21-4603(2)(a) was an inappropriate combination. The Court of Appeals determined that use of the word "appropriate" in 21-4603 implies that the combination of penalties under the statute should be harmonious. Incarceration coupled with restitution was not an appropriate combination under subsection (e).

The sentencing judge was correct when he set aside the May 3 order granting probation, but for the wrong reason. The judge was not without jurisdiction to grant or enter any order with respect to the defendant's motion for probation while Dubish's appeal was pending in the Supreme Court. However, under the power granted by the legislature, the judge does not have the right to grant probation for the one offense and impose imprisonment for other convictions arising out of the same transaction. To do so is a contradiction.

A sentencing judge has no jurisdiction to manipulate the eligibility date for release of a person sentenced to

the custody of the Secretary of Corrections by granting probation on certain convictions and incarceration on others. Under K.S.A. 1984 Supp. 21-4603(4), a judge may reduce the minimum term of confinement at any time before the expiration thereof when such reduction is recommended by the Secretary of Corrections. Prior to the court's exercise of the power to reduce a sentence below the statutory limitation of the minimum term prescribed for the crime for which an inmate has been convicted, a recommendation must be made by the Secretary of Corrections pursuant to 21-4603(4).

Affirmed.

APPENDIX "H"

No. 55,505

STATE OF KANSAS,
Appellee,
v.
ANDREW T. DUBISH,
Appellant.
(675 P.2d 877)

SYLLABUS BY THE COURT

1. STATUTES—*Penal Statutes—Construction.* Penal statutes must be strictly construed in favor of the persons sought to be subjected to them. The rule of strict construction simply means ordinary words are to be given their ordinary meaning. The statute should not be read to add that which is not readily found therein or to read out what as a matter of ordinary English language is in it. *State v. Martin,* 232 Kan. 778, 781, 658 P.2d 1024 (1983).

2. CRIMINAL LAW—*Sodomy.* Prior to July 1, 1983, married couples and consenting adult members of the opposite sex were the two types of couples which could not be prosecuted for sodomy.

3. JUDGMENTS—*Effective Date.* No judgment is effective unless and until a journal entry or judgment form is signed by the trial judge and filed with the clerk of the court. *In re Estate of Burns,* 227 Kan. 573, 575, 608 P.2d 942 (1980), construing K.S.A. 60-258.

4. CRIMINAL LAW—*Acquittal Motion by Defendant—Trial Court Considerations.* A trial court in passing on a motion for judgment of acquittal must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact therefrom, a reasonable mind, or rational trier of facts, might fairly conclude guilt beyond a reasonable doubt. *State v. Hill,* 233 Kan. 648, Syl. ¶ 3, 664 P.2d 480 (1983).

5. SAME—*Degree of Harm—Question of Fact.* Whether the injury or harm is "great" or not is generally a question of fact for the jury. *State v. Sanders,* 223 Kan. 550, 552, 575 P.2d 533 (1978).

6. SAME—*Charging the Jury.* In charging the jury in a criminal case, it is the duty of the trial court to define the offense charged, stating to the jury the essential elements of the crime, either in the language of the statute or in appropriate and accurate language of the court. *State v. Nesmith,* 220 Kan. 146, Syl. ¶ 3, 551 P.2d 896 (1976).

7. SAME—*Aggravated Battery—Jury Instructions.* The instruction of the court under the facts of this case, follows the language of K.S.A. 21-3414 and adequately defines aggravated battery.

8. SAME—*Intent as Element of Crime—Question of Fact—Direct Proof to Show Intent Not Required.* Specific intent as an element of the crime charged is normally a question of fact for the jury and may be shown by acts, circumstances and inferences reasonably deducible therefrom and need not be established by direct proof. *State v. Stringfield,* 4 Kan. App. 2d 559, Syl. ¶ 2, 608 P.2d 1041, *rev. denied* 228 Kan. 807 (1980). In

this case the jury, when reviewing the evidence, found that the defendant abducted the victim with the specific intent to inflict bodily injury upon her or to terrorize her.

9. SAME—*Prosecution of Multiple Counts for Single Wrongful Act.* The State may not split a single offense into separate parts. Where there is a single wrongful act it generally will not furnish the basis for more than one criminal prosecution.

10. SAME—*Charging of Separate Offenses Committed at Different Times and Places Is Not Multiplicitous.* Where offenses are committed separately and severally, at different times and at different places, they cannot be said to arise out of a single wrongful act.

Appeal from Lyon district court, William J. Dick, judge. Opinion filed January 13, 1984. Affirmed in part and reversed in part.

Don W. Lill, of Emporia, argued the cause and was on the brief for the appellant.

Rodney H. Symmonds, county attorney, argued the cause, and *Robert T. Stephan,* attorney general, was with him on the brief for the appellee.

The opinion of the court was delivered by

LOCKETT, J.: Andrew T. Dubish was convicted of aggravated kidnapping (K.S.A. 21-3421), aggravated sodomy (K.S.A. 21-3506), aggravated battery (K.S.A. 21-3414), and of making a terroristic threat (K.S.A. 21-3419). He appeals from these convictions.

The defendant, Andrew Dubish, and Mildred L. Dubish had been married for twenty years and had two sons,

Chris and Darren. The Dubishes separated on July 30, 1982. Mrs. Dubish filed for divorce on August 2, 1982. The divorce hearing was held September 17, 1982, but the journal entry granting Mrs. Dubish a divorce was not filed with the clerk of the court until October 15, 1982.

On October 4, 1982, Darren was celebrating his seventh birthday. The defendant arranged with Mrs. Dubish to spend time with his sons to celebrate Darren's birthday. On October 4, 1982, Mr. Dubish picked up Chris and Darren at Mrs. Dubish's residence at 1233 Thompson Street in Emporia. The defendant had agreed to return the children at 10:00 p.m. that evening. When the defendant returned to the residence at 10:00 p.m., Mrs. Dubish was not there. Chris, then age 15, informed his father that his mother was in the process of moving. Mr. Dubish, with the two boys in the vehicle, drove to the new residence. Finding no one there, he headed back towards the Thompson Street residence. On the return trip, the defendant and Mrs. Dubish passed each other. Mrs. Dubish turned her car around and followed the defendant to 1233 Thompson Street. Tom Thomsen, a friend of Mrs. Dubish, was following her in his car. Thomsen also turned and went to Mrs. Dubish's residence.

The defendant, upon arriving, parked in the driveway of the house. Mrs. Dubish also pulled into the driveway, and Mr. Thomsen parked across the street. The defendant saw Mr. Thomsen's car and asked Mrs. Dubish if that was her lover. Then the defendant walked across the street and told Thomsen if he "fucked with her [Mrs. Dubish], I would plant him." The defendant walked back across and Mr. Thomsen drove off.

While the defendant had been across the street talking to Thomsen, Mrs. Dubish had parked her car in the street

in front of her house. The defendant walked to the car and said he wanted to talk with her. Mrs. Dubish said they could speak there. The defendant stated he did not want to speak with her there. Mrs. Dubish attempted to back her car into the driveway. The defendant reached into the car and pulled the keys out of the ignition, but the car continued running. The defendant opened the car door and jerked Mrs. Dubish from the car by her hair. The defendant gave the car keys to Chris and told him to put the car in the garage. Chris got into the car and drove off. Chris later returned home and telephoned the police. The defendant kept stating he wished to speak with Mrs. Dubish, but she did not want to speak with him. The defendant dragged Mrs. Dubish to his pickup truck and shoved her into the truck. Mr. Dubish then ordered Darren into the truck and drove off with Mrs. Dubish and Darren in the truck.

The defendant drove north at a very fast rate. While driving, the defendant struck Mrs. Dubish in the face chipping one of her front teeth. Mrs. Dubish tried to jump out of the truck but was restrained by the defendant. The defendant drove north on Highway 99, turned off Highway 99 onto a gravel road and stopped near a pond. There Mr. Dubish threatened to throw Mrs. Dubish into the pond, stating that the pond was 30 feet deep. Because she could not swim, Mrs. Dubish was terrified. The defendant told Darren to lie down in the front seat. Mr. Dubish got out of the truck pulling Mrs. Dubish out with him. The defendant struck Mrs. Dubish numerous times in the face, stomach and back. He pulled her hair, kicked her and beat her until she fell to the ground. The defendant stated he hated her and wanted to kill her. He took her to the back of the truck, un-

zipped his pants and ordered Mrs. Dubish to perform oral sex. She told the defendant she did not want to, but he told her to do it. At the trial Mrs. Dubish testified she performed oral sex because she had been beaten and was frightened. After Mrs. Dubish had performed oral sex with the defendant, the defendant unzipped and pulled down Mrs. Dubish's pants and then beat her again. Mrs. Dubish could not remember precisely what occurred at this point in time.

After the beatings of Mrs. Dubish by the defendant had ended, the defendant retrieved a mirror from the truck and forced Mrs. Dubish to look into the mirror. He threatened to send two men to Mrs. Dubish's house to harm her if she called the police. Then the defendant drove off in his pickup truck leaving Mrs. Dubish lying in a ditch beside the road. The defendant soon returned to the scene but was unable to locate Mrs. Dubish, who was hiding. After the defendant left the second time, Mrs. Dubish rested, then got up and ran barefoot to a residence about a mile away. A Lyon County ambulance was called and took Mrs. Dubish to a hospital. At approximately 2:30 a.m. on October 5, 1982, Dr. Ginavan examined the victim at the hospital.

Mrs. Dubish stayed in the hospital until October 10, 1982. She was required to return to the hospital within an hour because of a urinary infection. Mrs. Dubish was released from the hospital on October 12, 1982.

A jury trial began on January 19, 1983, and ended January 26, 1983. During the trial Dr. Ginavan testified:

> "She [Mrs. Dubish] had marked swelling and bruising of the left cheek area. There was also swelling of the right cheek area. There were multiple bruises

of both arms and legs and upper chest and the left scapular area of the left back, and there were red linear discolorations of the neck and reddened area in the upper abdomen. Her—the white part of her left eye was hemorrhagic.

"Q. Now, what does that mean?

"A. The white part had blood in it, was red. There was tenderness of the right skull, posterior skull area. She had a quarter of an inch laceration of the forehead, and she complained of pain in the left chest and left elbow."

The defendant was convicted of aggravated kidnapping, aggravated sodomy, aggravated battery and of making terroristic threats. Mr. Dubish was sentenced to a life term of imprisonment for the aggravated kidnapping, not less than five years nor more than twenty for the aggravated sodomy, not less than three years nor more than ten years for the aggravated battery, and not less than one year nor more than two years for the terroristic threat.

The defendant argues first that he cannot be convicted of aggravated sodomy because he was still married to the victim at the time the alleged offense occurred; that K.S.A. 21-3505 does not permit a husband to be convicted of committing the crime of sodomy or aggravated sodomy against his wife.

K.S.A. 21-3506 provides:

"Aggravated sodomy is sodomy committed:

"(*a*) With force or threat of force, or where bodily harm is inflicted on the victim during the commission of the crime."

K.S.A. 21-3505 provides:

> "Sodomy is oral or anal copulation between persons who are not husband and wife or consenting adult members of the opposite sex."

Penal statutes must be strictly construed in favor of the persons sought to be subjected to them. The rule of strict construction simply means ordinary words are to be given their ordinary meaning. The statute should not be read to add that which is not readily found therein or to read out what as a matter of ordinary English language is in it. *State v. Martin,* 232 Kan. 778, 781, 658 P.2d 1024 (1983).

The question is whether a husband can be convicted for the sodomy of his wife. The State construes K.S.A. 21-3505 as meaning one may be convicted of sodomy if either the sodomy occurs between persons not husband or wife *or* if one adult member of the opposite sex does *not consent.* This would not seem to be a reasonable construction of the statute. Ascribing the statute's words their ordinary meaning, (1) a husband and wife cannot be convicted of sodomy for activities between them, and (2) neither can consenting members of the opposite sex. Prior to July 1, 1983, married couples and consenting adult members of the opposite sex were the two types of couples which could not be prosecuted for sodomy. This court recognized in *State v. Chears,* 231 Kan. 161, 163, 643 P.2d 154 (1982), that the State had to prove the victim was (1) a nonconsenting adult, and (2) not the wife of the defendant before the crime of aggravated sodomy could be proven.

The new sodomy statutes passed by the 1983 legislature became effective on July 1, 1983, adding credence

to the defendant's construction of the statutes in force on October 4, 1982. These new statutes read:

> "(1) Criminal sodomy is sodomy between persons who are members of the same sex or between a person and an animal." K.S.A. 1983 Supp. 21-3505.
>
> "Aggravated criminal sodomy is:
>
> . . . .
>
> "(c) sodomy with a person who does not consent to the sodomy or causing a person, without the person's consent, to engage in sodomy with any person or an animal, under any of the following circumstances:
>
> "(i) When the victim is overcome by force or fear." K.S.A. 1983 Supp. 21-3506.

A spouse may be prosecuted for the commission of aggravated criminal sodomy against his or her spouse pursuant to the new statutes. The specific reference to husbands and wives originally contained in K.S.A. 21-3505 was omitted. In determining the legislative intent for the purpose of statutory construction, the historical background and changes made in a statute are to be considered by the court; any changes and additions made in existing legislation raises a presumption that a change in meaning and effect was intended. *State ex rel. Stephan v. U.S.D. No. 428,* 231 Kan. 579, 647 P.2d 329 (1982). One of the members of the 1983 House Judiciary Committee in committee hearings stated the major issue regarding the bill amending K.S.A. Chapter 21, Article 35, was whether spouses would have immunity from prosecution for sexual offenses. An earlier version of the new K.S.A. 21-3506 contained similar wording to the old 21-3505. The committee voted to remove all spousal immunity from the

bill and the wording granting spousal immunity was abandoned. See K.S.A. 21-3502 and K.S.A. 1983 Supp. 21-3502.

A statute should never be given construction that leads to uncertainty, injustice or confusion, if possible to construe it otherwise. In construing a statute, words and phrases should be construed according to context and the approved usage of the language, and words in common use are to be given their natural and ordinary meaning. *Coe v. Security National Ins. Co.*, 228 Kan. 624, 620 P.2d 1108 (1980). The State's construction of the statute is strained and incorrect.

Were the defendant and the victim still married when the alleged crimes took place on October 4, 1982? That question requires a determination of when the divorce between the parties took effect.

The defendant and the victim separated on July 30, 1982. On September 17, 1982, a hearing was conducted by the district court concerning the divorce action filed by the victim in August of 1982. Both parties were present at the hearing. The trial judge granted the divorce and noted the granting of the divorce in his trial docket. The court directed the victim's attorney to prepare a journal entry. The journal entry was filed on October 15, 1982.

The State cites in *In re Estate of Penn*, 216 Kan. 153, 531 P.2d 133 (1975), in support of its argument that the divorce was effective on September 17, 1982. In *Penn*, the trial judge made a handwritten entry in his trial docket. The judge did not direct the preparation of a journal entry nor did he tell the clerk to enter the judgment in the appearance docket. The *Penn* court stated:

> "The entry in his trial docket by a trial judge of minutes reflecting in the present tense a judgment

> of divorce rendered in open court is tantamount to a direction to the clerk that such judgment be entered forthwith." 216 Kan. 153, Syl. ¶ 4.

The clerk's entry in the appearance docket would be an effective entry of judgment. The court differentiated the judicial act of rendering a judgment and the ministerial act of recording the judgment rendered. *Penn* was decided under the prior statute, K.S.A. 60-258(*b*) (Corrick), which provided:

> "(*b*) *What constitutes entry of judgment.* If judgment is to be entered on the verdict of a jury, or *by direction of the judge forthwith, the clerk shall make a notation of the judgment on the appearance docket* as provided by section 60-2601, and *such notation shall constitute the entry of judgment, and no journal entry or other document shall be required to render the judgment effective.* If the judge directs that the form of the judgment is to be settled by a journal entry or other document, it shall be prepared in accordance with the directions of the judge who shall then sign the same and cause it to be filed with the clerk. Such filing shall constitute the entry of the judgment, and it shall not be effective before such filing. The clerk shall forthwith note the filing of the journal entry on the appearance docket together with a brief abstract of the nature of the judgment." Emphasis supplied.

K.S.A. 60-258 was amended in 1976, and now provides:

> "Entry of judgments shall be subject to the provisions of section 60-254(*b*). No judgment shall be effective unless and until a journal entry or judg-

ment form is signed by the trial judge and filed with the clerk of the court. . . .

"When judgment is entered by judgment form the clerk shall serve a copy of the judgment form on all attorneys of record within three days. Service may be made personally or by mail. Failure of service of a copy of the judgment form shall not affect the validity of the judgment."

The new statute's language is clear. No judgment is effective unless and until a journal entry or judgment form is signed by the trial judge and filed with the clerk of the court. *In re Estate of Burns,* 227 Kan. 573, 575, 608 P.2d 942 (1980). In the recent case of *Anderson v. United Cab Co.,* 8 Kan. App. 2d 694, 666 P.2d 735, *rev. denied* September 8, 1983, the Court of Appeals found the notation of the decision of the trial judge in his trial docket, and the notification of the decision to the attorneys by letter, was not in compliance with K.S.A. 60-258. The letter contained a direction to defendant's counsel to prepare a proper journal entry. The Court of Appeals held entry of judgment did not take place until the journal entry was filed. See also *Smith v. Smith,* 8 Kan. App. 2d 252, 655 P.2d 469 (1982).

The entry of judgment in this case occurred on October 15, 1982, when the journal entry was signed by the judge and filed with the clerk of the court. On October 4, 1982, the defendant and the victim were still married.

The defendant contends the trial court erred in overruling the defendant's motion to reduce the charge of aggravated battery to the charge of battery. The defen-

dant argues the evidence did not establish that the victim suffered great bodily harm. The defendant's motion attacks the sufficiency of the evidence underlying the aggravated battery conviction. A motion attacking the sufficiency of the evidence is in reality no different than a motion for judgment of acquittal. *State v. Sanders*, 225 Kan. 147, 151, 587 P.2d 893 (1978). A trial court in passing on a motion for judgment of acquittal must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact therefrom, a reasonable mind, or rational trier of facts, might fairly conclude guilt beyond a reasonable doubt. *State v. Hill*, 233 Kan. 648, Syl. ¶ 3, 664 P.2d 840 (1983).

The crime of aggravated battery is defined by K.S.A. 21-3414:

> "Aggravated battery is the unlawful touching or application of force to the person of another with intent to injure that person or another and which either:
>
> "(*a*) Inflicts great bodily harm upon him; or
>
> "(*b*) Causes any disfigurement or dismemberment to or of his person; or
>
> "(*c*) Is done with a deadly weapon, or in any manner whereby great bodily harm, disfigurement, dismemberment, or death can be inflicted."

Bodily harm has been defined as "any touching of the victim against [the victim's] will, with physical force, in an intentional hostile and aggravated manner." *State v. Taylor*, 217 Kan. 706, 714, 538 P.2d 1375 (1975). The word "great" distinguishes the bodily harm necessary in

this offense from slight, trivial, minor or moderate harm, and as such it does not include mere bruises, which are likely to be sustained in simple battery. Whether the injury or harm is great or not is generally a question of fact for the jury. *State v. Sanders,* 223 Kan. 550, 552, 575 P.2d 533 (1978).

The defendant requested an instruction defining "great bodily harm." The defendant claims the trial court's refusal to define great body harm in its instruction was error. The court's instruction followed PIK Crim. 2d 56.18.

The court in *State v. Sanders,* 223 Kan. at 552, noted K.S.A. 21-3414 is couched in language which is readily understandable, and there are no omissions of necessary language. See *State v. Kleber,* 2 Kan. App. 2d 115, 119, 575 P.2d 900, *rev. denied* 225 Kan. 846 (1978). The Pattern Instructions for Kansas - Criminal for aggravated battery does not include a definition of great bodily harm. See PIK Crim. 2d 56.18.

In charging the jury in a criminal case, it is the duty of the trial court to define the offense charged, stating to the jury the essential elements of the crime, either in the language of the statute or in appropriate and accurate language of the court. *State v. Nesmith,* 220 Kan. 146, Syl. ¶ 3, 551 P.2d 896 (1976); *State v. Lashley,* 233 Kan. 620, Syl. ¶ 6, 664 P.2d 1358 (1983). The instruction of the court follows the language of K.S.A. 21-3414 and adequately defines aggravated battery.

The defendant claims the trial court erred in not directing a verdict for the defendant on the charge of aggravated kidnapping. The motion is essentially a motion for judgment of acquittal and attacks the sufficiency of the evidence. See K.S.A. 22-3419; *State v. Sanders,* 225

Kan. at 151. The standard for ruling on such motions has been previously stated in this opinion.

The defendant argues he did not have the requisite intent for conviction for aggravated kidnapping. K.S.A. 21-3421 provides:

> "Aggravated kidnapping is kidnapping, as defined in section 21-3420, when bodily harm is inflicted upon the person kidnapped."

K.S.A. 21-3420 provides:

> "Kidnapping is the taking or confining of any person, accomplished by force, threat or deception, with the intent to hold such person;
>
> . . . .
>
> "(*b*) To facilitate flight or the commission of any crime; or
>
> "(*c*) To inflict bodily injury or to terrorize the victim or another."

The charge of aggravated kidnapping against the defendant followed the statutory language contained in section (*c*). K.S.A. 21-3201 states that except as provided by sections 21-3202, 21-3204 and 21-3405, a criminal intent is an essential element of every crime defined by the Kansas Criminal Code. An element of aggravated kidnapping is the specific intent with which the taking or confining is done. *State v. McGee,* 224 Kan. 173, 177, 578 P.2d 269 (1978). One of the specific intents listed in K.S.A. 21-3420 must be proven before a person may be convicted of aggravated kidnapping. *State v. Brooks,* 222 Kan. 432, 434, 565 P.2d 241 (1977).

The defendant claims his only intent in shoving the victim into his truck and driving into the country was to

have an uninterrupted conversation with the victim. He stated his desire to speak with the victim several times. The evidence belies the defendant's stated motive. Defendant claims he wished to speak with the victim in private, but was not willing to hold a conversation near the victim's car. The defendant became very angry, pulled the victim from her car by her hair, struck her and dragged her to his truck. He hit the victim while driving and brutally beat the victim after he stopped the truck. During the beating, the defendant said he hated the victim and wanted to kill her. After stopping his vehicle, the defendant threatened to throw the victim into a 30-foot deep pond. The defendant was aware that Mrs. Dubish could not swim. Specific intent as an element of the crime charged is normally a question of fact for the jury and may be shown by acts, circumstances and inferences reasonably deducible therefrom and need not be established by direct proof. *State v. Stringfield,* 4 Kan. App. 2d 559, Syl. ¶ 2, 608 P.2d 1041, *rev. denied* 228 Kan. 807 (1980). The jury, when reviewing the evidence, found that the defendant abducted the victim with the specific intent to inflict bodily injury upon her or to terrorize her.

The defendant contends he cannot be convicted of aggravated kidnapping, aggravated sodomy, aggravated battery and terroristic threats because his conduct constituted one continuing act of force. In essence, defendant argues the four charges are multiplicitous. The defendant does not contest the aggravated kidnapping conviction under this issue, but claims the other three convictions are multiplicitous since he had been convicted of aggravated kidnapping. Since we have determined that the defendant and the victim were married, his conviction for aggravated sodomy was erroneous. The question is narrowed to whether under the facts of this case the defen-

dant's convictions for aggravated battery and terroristic threat were multiplicitous.

The State claims the defendant did not raise the issue at the trial level and should not be allowed to raise the issue on appeal. Generally, an appellate court will consider only those issues presented to the trial court for determination. *State v. Puckett,* 230 Kan. 596, 598, 640 P.2d 1198 (1982). One of the exceptions to the general rule stated in *Puckett* is if consideration of the issue raised on appeal is necessary to serve the ends of justice or to prevent denial of fundamental rights. 230 Kan. at 598.

The issue of multiplicity was considered in *State v. Dorsey,* 224 Kan. 152, 578 P.2d 261 (1978). The court stated the principal danger raised by a multiplicitous indictment is the possibility that the defendant will receive more than one sentence for a single offense. 224 Kan. at 154-55. The fundamental right of a defendant to a fair trial under the 5th and 14th Amendments to the Constitution of the United States would be violated by a multiplicitous conviction.

The State may not split a single offense into separate parts. Where there is a single wrongful act it generally will not furnish the basis for more than one criminal prosecution. In *State v. Lassley,* 218 Kan. 758, 545 P.2d 383 (1976), we held that a single and continuing act of force could not form the basis for the crimes of aggravated assault and kidnapping. Lassley, armed with a knife, accosted a young woman in the home where she was baby-sitting. He ordered her outside, placed the knife at her throat, and subsequently took her to some nearby shrubs where she was raped. He was charged and convicted of kidnapping, aggravated assault and rape. This court stated:

"Both the kidnapping and rape charges required proof of the element of force. In each instance the force was supplied by evidence of the conduct of defendant in ordering the victim to do acts under the implied threat of harm. The fact defendant had a knife in his hand was significant in establishing the force element of both crimes. This same act of force cannot also provide the basis for the charge of aggravated assault. . . . The conduct of defendant in the instant case constitutes a single continuous transaction in which two separate and distinct offenses were committed. The act cited by the prosecution as constituting the offense of aggravated assault was part of the act of kidnapping and a prelude to the act of rape. In sum, this case presents a situation where there was a continuous act of force on the part of the defendant. The act which was relied on for the charges of rape and kidnapping cannot also be used to provide the basis of a separate offense. We hold therefore that the trial court erred in refusing to dismiss the charge of aggravated assault." 218 Kan. at 761-62.

In *State v. Racey,* 225 Kan. 404, 590 P.2d 1064 (1979), defendant Racey was convicted of kidnapping and aggravated assault. Racey continually threatened the victim of the kidnapping with a gun from the time the victim got into the car until the victim was rescued. This court found there was but one continuing act of force. The court set aside the conviction of aggravated assault. In *Lassley* and *Racey* the defendants continually threatened the victim by displaying a weapon; one continuing act of force was used as the basis for more than one conviction. But a single act may constitute two or more

distinct and separate offenses, and a person charged with such act as two separate offenses may be convicted and punished for both. In *State v. Rueckert,* 221 Kan. 727, 561 P.2d 850 (1977), this court determined that when a homicide is committed in the course of an aggravated robbery, the offenses do not merge. The essence of aggravated robbery is to deprive a person of property, an element not found in homicide. Where offenses are committed separately and severally, at different times and at different places, they cannot be said to arise out of a single wrongful act. In *State v. James,* 216 Kan. 235, 531 P.2d 70 (1975), this court determined that an assault and battery, following which the victim broke away, does not merge with and is distinct from forcible rape, which occurred at a later time and at a different place. For additional discussion on multiplicity see *State v. Chears,* 231 Kan. at 162-63.

We will now review the facts of this case as they apply to the remaining convictions. Defendant was convicted of (1) aggravated kidnapping, (2) aggravated battery, and (3) terroristic threat. The aggravated kidnapping occurred at the victim's home. The defendant beat, pulled and dragged the victim to his pickup truck. After forcing the victim into the pickup truck, the defendant transported the victim to a pond. That act was separate and distinct from what occurred sometime later in a field near the pond.

After the pickup was stopped in a remote field near the pond, the defendant forcefully removed the victim from the vehicle. He again beat Mrs. Dubish, striking her in the face, stomach and back, pulled her hair and kicked her numerous times. After being beaten into

submission, the victim was forced by the defendant to commit oral sex. The acts of hitting and kicking the victim were sufficient for the jury to find the defendant guilty of aggravated battery.

Following the act of oral sex, the defendant again beat the victim. Just prior to abandoning the victim in the field, the defendant committed the act of terroristic threat. He retrieved a mirror from the pickup truck and forced the victim to look into the mirror. The defendant then threatened to send two men to the victim's house to harm her if she called the police.

Each offense was committed separately and severally, at different times. The aggravated kidnapping occurred at a separate place than the aggravated battery and the terroristic threat. The offenses cannot be said to arise out of a single wrongful act. The defendant's claim that the acts of aggravated kidnapping, aggravated battery, and terroristic threat constituted one continuing act of force is without merit.

The conviction and the sentence for aggravated sodomy as charged in count III of the information is set aside and the judgment is reversed to that extent; in all other respects the judgment is affirmed.